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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 IN RE HP SECURITIES LITIGATION,
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14 This Document Relates To: All Actions
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Case No. 11-CV-05980 CRB

CLASS ACTION

**DEFENDANT JAMES T. MURRIN'S
MOTION TO DISMISS CONSOLIDATED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS**

Date: November 8, 2013
Time: 10:00 a.m.
Place: Courtroom 6
Judge: The Honorable Charles R. Breyer

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28

TABLE OF CONTENTS

Page

NOTICE OF MOTION AND MOTION	1
ISSUE TO BE DECIDED.....	1
POINTS AND AUTHORITIES.....	2
I. INTRODUCTION	2
II. STATEMENT OF FACTS	3
III. APPLICABLE LEGAL STANDARDS	4
IV. THE COMPLAINT DOES NOT STATE A CLAIM FOR CONTROL PERSON LIABILITY AGAINST MR. MURRIN	5
V. CONCLUSION	8

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Cement Masons & Plasterers Joint Pension Fund v. Equinix, Inc.</i> , 2013 WL 2931422 (N.D. Cal. June 13, 2013)	4
<i>Cho v. UCBH Holdings, Inc.</i> , 890 F. Supp. 2d 1190 (N.D. Cal. 2012)	7
<i>City of Westland Police and Fire Ret. Sys. v. Sonic Solutions</i> , 2009 WL 942182 (N.D. Cal. Apr. 6, 2009)	7
<i>Glenbrook Cap. Ltd. P'ship v. Kuo</i> , 2009 WL 839289 (N.D. Cal. Mar. 30, 2009)	5
<i>Howard v. Everex Sys., Inc.</i> , 228 F.3d 1057 (9th Cir. 2000)	4, 5, 6, 7
<i>Howard v. Hui</i> , 2001 WL 1159780 (N.D. Cal. Sept. 24, 2001)	5
<i>In re Atmel Corp. Deriv. Litig.</i> , 2008 WL 2561957 (N.D. Cal. June 25, 2008)	5
<i>In re Downey Sec. Litig.</i> , 2009 WL 2767670 (C.D. Cal. Aug. 21, 2009)	6, 8
<i>In re Gupta Corp. Sec Litig.</i> , 900 F. Supp. 1217 (N.D. Cal. 1994)	6
<i>In re Hansen Natural Corp. Sec. Litig.</i> , 527 F. Supp. 2d 1142 (C.D. Cal. Oct. 16, 2007)	7
<i>In re Impac Mortg. Holdings, Inc. Sec. Litig.</i> , 554 F. Supp. 2d 1083 (C.D. Cal. 2008)	6
<i>In re McKesson HBOC, Inc. Sec. Litig.</i> , 126 F. Supp. 2d 1248 (N.D. Cal. 2000)	6, 7
<i>In re Metawave Commc'ns Corp. Sec. Litig.</i> , 298 F. Supp. 2d 1056 (W.D. Wash. 2003)	6
<i>In re Oak Tech. Sec. Litig.</i> , 1997 WL 448168 (N.D. Cal. Aug. 1, 1997)	5
<i>In re Petco Animal Supplies Inc. Sec. Litig.</i> , 2006 WL 6829623 (S.D. Cal. Aug. 1, 2006)	7
<i>In re Ramp Networks, Inc. Sec. Litig.</i> , 201 F. Supp. 2d 1051 (N.D. Cal. 2002)	5
<i>In re Silicon Storage Tech., Inc. Deriv. Litig.</i> , 2009 WL 1974535 (N.D. Cal. July 7, 2009)	4
<i>In re Splash Tech. Holdings, Inc. Sec. Litig.</i> , 2000 WL 1727405 (N.D. Cal. Sept. 29, 2000)	5, 7, 8
<i>In re Toyota Motor Corp. Sec. Litig.</i> , 2011 WL 2675395 (C.D. Cal. Jul. 7, 2011)	7
<i>Madden v. Cowen & Co.</i> , 576 F.3d 957 (9th Cir. 2009)	4

1	<i>Middlesex Ret. Sys. v. Quest Software, Inc.</i> ,	
2	527 F. Supp. 2d 1164 (C.D. Cal. 2007)	7, 8
3	<i>Paracor Fin., Inc. v. General Elec. Capital Corp.</i> ,	
4	96 F.3d 1151 (9th Cir. 1996).....	6, 8
5	<i>Red River Resources, Inc. v. Mariner Sys., Inc.</i> ,	
6	2012 WL 2507517 (D. Ariz. June 29, 2012)	6
7	<i>Zucco Partners, LLC v. Digimarc Corp.</i> ,	
8	552 F.3d 981 (9th Cir. 2009).....	5, 7
9	STATUTES	
10	Private Securities Litigation Reform Act of 1995	
11	15 U.S.C. § 78u-4(b)(1)-(2)	1
12	Securities Exchange Act of 1934	
13	Section 10(b), 15 U.S.C. § 78j(b)	<i>passim</i>
14	Section 20(a), 15 U.S.C. § 78t(a).....	<i>passim</i>
15	RULES AND REGULATIONS	
16	17 C.F.R. § 230.405	5
17	Federal Rules of Civil Procedure	
18	Rule 9(b)	1, 4, 5
19	Rule 12(b)(6).....	1
20		
21		
22		
23		
24		
25		
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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on November 8, 2013, at 10:00 a.m. or as soon thereafter as
3 the matter may be heard, in the Courtroom of the Honorable Charles R. Breyer, located at the
4 United States District Court, 450 Golden Gate Avenue, San Francisco, California, defendant James
5 T. Murrin will and hereby does move the Court for an order dismissing the Consolidated
6 Complaint for Violation of the Federal Securities Laws (“Complaint” or “Compl.”) with prejudice.

7 Mr. Murrin asks the Court to dismiss the Complaint pursuant to Federal Rules of Civil
8 Procedure 12(b)(6) and 9(b) and the Private Securities Litigation Reform Act of 1995 (“PSLRA”),
9 on the grounds that the Complaint does not contain facts sufficient to state a claim against him for
10 violation of Section 20(a) of the Securities Exchange Act of 1934 (“1934 Act”).¹ Mr. Murrin’s
11 motion is based upon: this Notice of Motion and Motion; the following Points and Authorities; the
12 pleadings and records on file in this action; the motions to dismiss and supporting papers filed by
13 other defendants; and on such further argument and materials as may be submitted to the Court.

14 In addition, Mr. Murrin hereby joins in the motion to dismiss filed separately by defendant
15 Hewlett-Packard Company (“HP” or the “Company”), and incorporates the arguments and
16 authorities set forth in HP’s moving papers, as well as the additional papers filed by HP in support
17 of its motion and the applicable arguments made by the other defendants in their moving papers.

18 **ISSUE TO BE DECIDED**

19 Whether the Complaint should be dismissed as to Mr. Murrin where:

20 a. Plaintiff does not suggest that Mr. Murrin himself engaged in any acts or conduct
21 giving rise to a claim under Section 10(b), and instead only asserts a claim against him as a
22 purported “control person” of HP under Section 20(a);

23 b. Plaintiff fails to allege, in conformity with the PSLRA, an underlying violation of
24 Section 10(b) by HP (or, for that matter, any other defendant); and

25 c. In any event, plaintiff fails to allege particularized facts showing that Mr. Murrin
26 possessed the power to control corporate actions, much less those actions alleged to constitute an
27 underlying violation of the 1934 Act by HP.

28 ¹ Unless otherwise specified, all statutory citations are to the 1934 Act.

POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff spends nearly 100 pages purporting to set forth the basis for its claims. As to Mr. Murrin, however, the Complaint is most significant for what it fails to say. Plaintiff does not allege that Mr. Murrin made any false statements, acted with scienter, or otherwise violated Section 10(b). To the contrary, plaintiff disavows any such claim and stresses that Mr. Murrin is sued solely as an alleged control person of HP under Section 20(a). Compl. ¶ 116.

Even as to that narrow theory of liability, the Complaint does not come close to alleging the particularized facts necessary to state a claim. Not only is plaintiff unable to plead an underlying violation of Section 10(b) by HP – a defect that, by itself, mandates dismissal of the control person claim – there are no facts even arguably showing Mr. Murrin’s control over the Company. Indeed, the Complaint contains virtually no reference to Mr. Murrin. Apart from being identified in passing as a defendant (Compl. ¶ 3), the Complaint mentions him in just two paragraphs. *Id.* ¶¶ 116, 179. The only “facts” alleged with respect to Mr. Murrin are that:

- He has worked at HP for 24 years, was Senior Vice President, Controller and Principal Accounting Officer from March 2007 to May 2012, and thereafter became Senior Vice President and General Manager within HP’s Enterprise Services business (*id.* ¶ 116);
- He was “listed as one of HP’s 15 top executives in [its] 2011 Annual Report,” and was one of the persons who signed the Company’s 2011 Form 10-K (*id.* ¶¶ 116, 179); and
- He “participated” – in some unspecified way – “in HP’s March 21, 2012 HP Annual Meeting of Stockholders” (*id.* ¶ 116).

Nor does the Complaint aver that Mr. Murrin had any involvement in the events underlying plaintiff’s Section 10(b) claim. There is no allegation that Mr. Murrin played any role in the negotiations leading up to HP’s acquisition of Autonomy Corporation plc (“Autonomy”), was involved in the due diligence, was aware of improper accounting by Autonomy (either before or after the deal was completed), or had responsibility for HP’s ultimate decision to write down assets acquired in connection with that transaction. In fact, the Complaint does not even purport to describe any of Mr. Murrin’s duties, responsibilities or functions during the class period, resting instead on cursory references to his job titles. Compl. ¶ 116. And, perhaps most notably, plaintiff offers nothing to suggest that Mr. Murrin had the ability to control the statements allegedly giving

1 rise to HP's liability under Section 10(b) – which is hardly surprising, inasmuch as the Complaint
2 attributes those statements to HP executives who outranked him.

3 Put simply, plaintiff does not begin to allege the elements of a control person claim against
4 Mr. Murrin. His motion to dismiss should therefore be granted.

5 **II. STATEMENT OF FACTS**

6 Lead Plaintiff PGGM Vermogensbeheer B.V. (“plaintiff”) brings this action on behalf of
7 persons who acquired HP's common stock between August 19, 2011 and November 20, 2012 (the
8 “class period”). Plaintiff claims that that HP's stock price was inflated during the class period as a
9 result of alleged misstatements relating to the Company's \$11 billion acquisition of UK-based
10 Autonomy, which was completed in October 2011. *See, e.g.*, Compl. ¶¶ 3, 4, 7, 90, 210-213. The
11 crux of the Complaint is the theory that Autonomy overstated its financial results by violating
12 governing accounting principles, HP should have discovered those issues during its due diligence,
13 and certain of HP's financial results were rendered inaccurate as a result of Autonomy's alleged
14 accounting improprieties. *See, e.g., id.* ¶¶ 7-8. Plaintiff avers that the “truth” was “partially
15 revealed” in August 2012, and then “fully” disclosed on November 20, 2012 when HP announced
16 it would be recognizing a non-cash goodwill and intangible asset impairment charge of \$8.8 billion
17 relating to the Autonomy business. *Id.* ¶¶ 5, 214-218.

18 The relevant factual background pertaining to the Autonomy acquisition, HP's integration
19 efforts, accounting issues and the ultimate write-down decision are discussed in HP's separate
20 motion to dismiss (“HP Mot.”). In the interest of efficiency and economy, Mr. Murrin refers the
21 Court to HP's discussion (*see* HP Mot. at 1-4), which is incorporated by reference.

22 With respect to Mr. Murrin, the relevant factual allegations are both sparse and innocuous.
23 The Complaint notes that Mr. Murrin has been employed by HP for 24 years and served in two
24 jobs during the class period: Senior Vice President, Controller and Principal Accounting Officer
25 (from March 2007 until May 1, 2012) and then Senior Vice President and General Manager within
26 HP's Enterprise Services business. Compl. ¶ 116. Plaintiff further avers Mr. Murrin was “listed as
27 one of HP's 15 top executives in [its] 2011 Annual Report,” and was one of a number of persons
28 who signed HP's 2011 Form 10-K. *Id.* ¶¶ 116, 179. Plaintiff also asserts Mr. Murrin “participated

1 in HP's March 21, 2012 HP Annual Meeting of Stockholders," but never explains what he did at
2 that meeting or why that cryptic assertion has any relevance. *Id.* ¶ 116. That is the sum total of
3 plaintiff's allegations regarding Mr. Murrin. The Complaint says nothing about his actual day-to-
4 day duties and responsibilities during the class period, contains no allegations regarding his
5 interaction with other defendants, and does not identify any statement attributed to him.

6 Plaintiff alleges that HP and six current or former officers and directors are liable under
7 Section 10(b) for allegedly misleading statements made during the class period.² Mr. Murrin,
8 however, is not alleged to have violated Section 10(b), and is "named solely as a control person"
9 of HP under Section 20(a). Compl. ¶ 116. The other individual defendants are also alleged to
10 have controlled HP within the meaning of Section 20(a). *Id.* ¶ 240.

11 **III. APPLICABLE LEGAL STANDARDS**

12 "Control person liability is secondary only and cannot exist in the absence of a primary
13 violation." *In re Silicon Storage Tech., Inc. Deriv. Litig.*, 2009 WL 1974535, at *11 (N.D. Cal.
14 July 7, 2009) (citations and quotations omitted). To plead a Section 20(a) claim, plaintiff must
15 allege: (1) an underlying violation of Section 10(b) by the purportedly "controlled" entity; and (2)
16 "that the defendant exercised actual power or control over the primary violator." *Id.* (quoting
17 *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000)).

18 With respect to the first of these elements – an underlying violation of Section 10(b) –
19 plaintiff must comply not only with Fed. R. Civ. P. 9(b), but also with the stringent pleading
20 requirements of the PSLRA. *Cement Masons & Plasterers Joint Pension Fund v. Equinix, Inc.*,
21 2013 WL 2931422, at *5 (N.D. Cal. June 13, 2013). As discussed more fully in HP's motion (HP
22 Mot. §§ I, II), the PSLRA contains numerous pleading requirements and other provisions designed
23 to "limit[] the potential liability of defendants" and "requir[e] plaintiffs . . . to surmount a number
24 of procedural hurdles." *Madden v. Cowen & Co.*, 576 F.3d 957, 964 (9th Cir. 2009).

25 The second element of a Section 20(a) claim – defendant's exercise of "actual power or

26 ² Those individuals are: Leo Apotheker (HP's former CEO); Margaret C. Whitman (HP's current
27 CEO); Catherine A. Lesjak (HP's CFO); Raymond J. Lane (a director and former Executive
28 Chairman of the Board); Shane V. Robison (former Executive Vice President and Chief Strategy
and Technology Officer); and Michael Lynch (Autonomy's founder who served as HP's Executive
Vice President of Information Management following the acquisition). Compl. ¶¶ 109-117.

1 control over the primary violator” – is similarly subject to heightened pleading standards. As this
2 Court has held, plaintiff must “plead the circumstances of the control relationship with sufficient
3 particularity to satisfy rule 9(b).” *Howard v. Hui*, 2001 WL 1159780, at *4 (N.D. Cal. Sept. 24,
4 2001) (Breyer, J.). *See also Glenbrook Cap. Ltd. P’ship v. Kuo*, 2009 WL 839289, at *18 (N.D.
5 Cal. Mar. 30, 2009) (“Where a plaintiff asserts a Section 20(a) claim based on an underlying
6 violation of Section 10(b), the pleading requirements for both violations are the same”); *In re*
7 *Atmel Corp. Deriv. Litig.*, 2008 WL 2561957, at *11 (N.D. Cal. June 25, 2008) (under the PSLRA,
8 plaintiffs are required to “plead the circumstances of the control relationship with particularity”).³

9 10 **IV. THE COMPLAINT DOES NOT STATE A CLAIM FOR CONTROL PERSON LIABILITY AGAINST MR. MURRIN**

11 As discussed in HP’s motion, plaintiff does not allege any violation of Section 10(b) by the
12 Company. *See* HP Mot. §§ I, II. For that reason alone, there can be no Section 20(a) claim against
13 Mr. Murrin. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).

14 In addition, the Complaint fails to allege that Mr. Murrin “controlled” the Company with
15 respect to any statement that is even arguably actionable. For purposes of Section 20(a), the Ninth
16 Circuit has adopted the SEC’s definition of “control,” which requires “the possession, direct or
17 indirect, of the power to direct or cause the direction of the management and policies of a person,
18 whether through ownership of voting securities, by contract, or otherwise.” *Howard*, 228 F.3d at
19 1065 n.9 (quoting 17 C.F.R. § 230.405). Under that definition, an individual’s status as a control
20 person involves “scrutiny of [his] participation in the day-to-day affairs of the corporation and [his]
21 power to control corporate actions.” *Howard*, 228 F.3d at 1065.

22 Plaintiff’s factual allegations regarding Mr. Murrin’s supposed control over HP are found
23 entirely in paragraph 116 of the Complaint, and consist of the following:

- 24 • **His corporate status:** “James T. Murrin was Senior Vice President, Controller and
25 Principal Accounting Officer at HP from March 2007 to May 2012. On March 22,
26 2012, Murrin resigned his position ... effective May 1, 2012, and accepted the
position of Senior Vice President and General Manager within HP’s Enterprise
Services business. Murrin, a 24-year veteran of HP, was listed as one of HP’s 15 top

27 ³ *See also In re Ramp Networks, Inc. Sec. Litig.*, 201 F. Supp. 2d 1051, 1063 (N.D. Cal. 2002); *In*
28 *re Splash Tech. Holdings, Inc. Sec. Litig.*, 2000 WL 1727405, at *16 (N.D. Cal. Sept. 29, 2000); *In*
re Oak Tech. Sec. Litig., 1997 WL 448168, at *14-15 (N.D. Cal. Aug. 1, 1997).

1 executives in the Company's 2011 Annual Report."

- 2 • **His signature on one document:** "During the class period, Murrin signed and had
3 ultimate control and authority over HP's 2011 Annual Report on Form 10-K."
- 4 • **His attendance at one meeting:** "Murrin also participated in HP's March 21, 2012
Annual Meeting of Stockholders."

5 These conclusory allegations do nothing to establish Mr. Murrin's "participation in the day-to-day
6 affairs of the corporation" or his "power to control corporate actions." *Howard*, 228 F.3d at 1065.

7 Plaintiff's averments regarding Mr. Murrin's status as an executive of HP are insufficient to
8 support a control person claim. *Paracor Fin., Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151,
9 1163 (9th Cir. 1996) (fact that a person is a high-ranking officer – even the CEO – does not create
10 a presumption that he or she is a "controlling person"). *See also In re Gupta Corp. Sec Litig.*, 900
11 F. Supp. 1217, 1243 (N.D. Cal. 1994) ("[s]tatus alone is ordinarily insufficient to establish control
12 person liability"); *Red River Resources, Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, at *9 (D.
13 Ariz. June 29, 2012) (dismissing Section 20(a) claim where plaintiff's allegations of control person
14 liability consisted almost entirely of conclusory assertions regarding defendants' executive
15 positions); *In re Metawave Commc'ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1091 (W.D. Wash.
16 2003) ("Liang's titles of President of World Trade and Vice President for Worldwide operations do
17 not establish that Liang had control"). What is required – but what is missing from the Complaint
18 – are particularized facts showing that, in his various positions during the class period, Mr. Murrin
19 exercised actual control over HP and the alleged misstatements at issue. *See In re Downey Sec.*
20 *Litig.*, 2009 WL 2767670, at *15 (C.D. Cal. Aug. 21, 2009) (dismissing Section 20(a) claim in
21 absence of particularized allegations showing defendants' exercise of control); *In re Impac Mortg.*
22 *Holdings, Inc. Sec. Litig.*, 554 F. Supp. 2d 1083, 1101 n.12 (C.D. Cal. 2008) (plaintiffs failed to
23 allege, "with particularity, that each Defendant possessed 'a significant degree of day-to-day
24 operational control, amounting to the power to dictate another party's conduct or operations'")
25 (citing *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1277 (N.D. Cal. 2000)).

26 Plaintiff's boilerplate assertions that the "Insider Defendants" were able "to control the
27 contents" of HP documents in unidentified ways, were "involved in HP's day-to-day operations ...
28 at the highest levels, and somehow had "access" to unspecified information (Compl. ¶ 119), do

1 nothing to satisfy plaintiff's pleading burden. Such generic and undifferentiated allegations are
2 insufficient to allege that Mr. Murrin is a control person with respect to any alleged misstatements.
3 *City of Westland Police and Fire Ret. Sys. v. Sonic Solutions*, 2009 WL 942182, at *11 (N.D. Cal.
4 Apr. 6, 2009) (dismissing Section 20(a) claims where they consisted solely of "bare legal
5 conclusions . . . devoid of any factual underpinnings"); *In re Hansen Natural Corp. Sec. Litig.*, 527
6 F. Supp. 2d 1142, 1163 (C.D. Cal. Oct. 16, 2007) (rejecting similar boilerplate allegations as
7 insufficient to establish control person liability); *In re Petco Animal Supplies Inc. Sec. Litig.*, 2006
8 WL 6829623, at *31 (S.D. Cal. Aug. 1, 2006) (dismissing Section 20(a) claims where " boilerplate
9 allegations of control ... lack[ed] sufficient facts to apply the theory" to certain defendants).

10 Underscoring plaintiff's pleading failure is the fact that the claim against HP is premised on
11 statements allegedly made by individuals with positions higher than Mr. Murrin's. Compl. ¶¶ 109-
12 117. It defies logic to suggest Mr. Murrin had the ability to "control" his superiors. *See Middlesex*
13 *Ret. Sys. v. Quest Software, Inc.*, 527 F. Supp. 2d 1164, 1194 (C.D. Cal. 2007) ("it is difficult for
14 the Court to determine how, as a Vice President, Garn was able to exercise control over the other
15 10b-5 Defendants when the other 10b-5 Defendants held positions of Vice President or higher");
16 *In re Toyota Motor Corp. Sec. Litig.*, 2011 WL 2675395, at *5 (C.D. Cal. Jul. 7, 2011) (dismissing
17 Section 20(a) claims where there was nothing in the complaint suggesting any actual supervisory
18 role over the individual defendants alleged to be speakers).⁴

19 Equally fruitless is the perfunctory assertion that Mr. Murrin signed HP's Form 10-K for
20 fiscal 2011. Compl. ¶ 116. At the outset, plaintiff is unable to plead that any statement in the 10-K
21 is actionable (*see* HP Mot. §§ I, II), which dooms a Section 20(a) claim. *Zucco*, 552 F.3d at 990.
22 Apart from that, the Complaint offers no factual allegations regarding Mr. Murrin's actual control
23 over the 10-K. While courts have held an officer's signature on a document may be suggestive of
24 his ability to control the contents,⁵ plaintiff makes no allegations regarding Mr. Murrin's role in the
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26 ⁴ *See also McKesson*, 126 F. Supp. 2d at 1277 (complaint failed to identify how defendants
27 controlled those who allegedly violated Section 10(b); the court also noted that certain defendants,
including the Chief Operating Officer, appeared to be too low-ranking to be control persons).

28 ⁵ *See, e.g., Howard*, 228 F.3d at 1066; *Cho v. UCBH Holdings, Inc.*, 890 F. Supp. 2d 1190, 1208
(N.D. Cal. 2012); *Splash*, 2000 WL 1727405, at *16.

1 preparation of the 10-K or his ability to dictate what was actually said in that filing. *See Splash*,
2 2000 WL 1727405, at *16 (while director’s signature on registration statement and prospectus
3 “suggests the possibility of control,” the absence of specific factual allegations as to that defendant
4 meant that plaintiffs did not plead control adequately). Indeed, the absence of such allegations is
5 highlighted by the fact that plaintiff does not contend any statement in the 10-K supports a Section
6 10(b) claim against Mr. Murrin. And, in any event, a signature on the 10-K would do nothing to
7 demonstrate control over other alleged misstatements. *See Paracor*, 96 F.3d at 1163; *Downey*,
8 2009 WL 2767670, at *15.

9 Finally, the allegation that Mr. Murrin “participated” in HP’s March 21, 2012 shareholder
10 meeting (Compl. ¶ 116) is unavailing. Plaintiff furnishes no explanation regarding the nature or
11 significance of such “participat[ion].” Moreover, the Complaint identifies just one comment (by
12 Ms. Whitman) made at that meeting. Compl. ¶ 189. Not only does plaintiff fail to plead that the
13 comment was false or made with scienter, there is no hint that Mr. Murrin exercised control over
14 HP’s CEO – and any such suggestion would be illogical. *See, e.g., Quest*, 527 F. Supp. 2d at 1194.

15 **V. CONCLUSION**

16 For the foregoing reasons, the Complaint should be dismissed as to Mr. Murrin.

17 Dated: July 2, 2013

FENWICK & WEST LLP

18 By /s/ Kevin P. Muck
19 Kevin P. Muck

20 Attorneys for Defendant James T. Murrin
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